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Law Reform Commission
of Canada

Commission de réforme du droit
du Canada

Codification

SEMINAR

Towards a new
Criminal Code
for Canada

SEMINAIRE

Vers un nouveau
code criminel
pour le Canada

Westin Hotel Ottawa
1-2-3/4/1984

NOTICE

This paper has been prepared by the Substantive Criminal Law Project for consultation purposes only.

AVIS

Ce document préparé par la section de recherche en droit pénal, est destiné uniquement à la consultation.

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INTRODUCTION

1. The Law Reform Commission of Canada was established in 1971 with the following mandate:

- to review the laws of Canada with a view to their improvement, modernization and reform;
- to develop new approaches to law to respond to the changing needs of modern Canadian society;
- to reflect in its work the common law and civil law concepts and institutions.

2. On the Commission's list of priorities at the outset was criminal law, which falls in Canada within federal jurisdiction. That law is contained mainly in the Criminal Code of Canada which is itself based on common law. Copied from earlier English attempts at codification, this Code was enacted in 1892, revised in 1955 and since then subjected to numerous ad hoc amendments. As a result, its need for a complete overhaul and restructuring was unanimously agreed upon.

3. For this purpose the Commission was expected, according to the Minister of Justice in 1971, to undertake "a deep philosophical probe of the whole criminal law of Canada". To do this it conducted an in-depth study of the aims and purposes of criminal law in general. Fruits of this study were two Working Papers, The Meaning of Guilt and Limits of Criminal Law, and a Report to Parliament, Our Criminal Law. This Report, with its recommendations that criminal law be seen as an instrument of last resort, be used with restraint, be concerned with "real" crimes requiring mens rea and involving serious violations of important values in our society, has been officially accepted by the Federal Government in Canada as the starting-point for reforming our present law and as the basic premise in Canada's criminal justice policy.

4. Building on the principles contained in Our Criminal Law, the Commission has produced numerous papers and reports in the substantive area of the criminal law.¹ These deal with:

- Theft and Fraud
- Sexual Offences
- Contempt of Court

Criteria for Determination of Death
Euthanasia and Cessation of Treatment
Liability and Defences

Presently the Commission is in the process of publishing several further papers in this area. These relate to:

Homicide
Assault and Related Offences
Corporate Criminal Liability
Criminal Libel
Vandalism (Mischief and Arson)

At the same time, papers are in semi-final draft on the following topics:

Jurisdiction
Criminal Participation
Attempt and Incitement
Perjury and Offences against Justice

5. In these circumstances it was thought appropriate to parallel further investigations in the General and Special

Parts of Criminal Law with an attempt to produce an outline draft of a new substantive Criminal Code.² The object of this attempt would be to manifest the principles governing that Code, to explore its arrangements and to work on the most suitable style. For throughout its work to date, the Commission has always been conscious that the ultimate goal was codification.

6. For this reason the Commission published a study paper in 1971 on Codification. This study set out our thinking on the nature, purpose and principles of codifying in general. These principles had been exemplified in a draft Code of Evidence which we produced in 1975 but which so far has met with considerable resistance from the legal profession. But it is these principles which, in our view, must inform any new Criminal Code in Canada.

I - CODIFICATION

7. Clearly a code - whether it be the Canadian Criminal Code, the California Code of Criminal Law or the Model Penal Code - is seen as more than just a statute. It is, in the first place, a legal enactment that is comprehensive; it contains in it all the laws relating to the subject in question. This was clearly the concept held by earlier codifiers like Macaulay, Wright and Stephen himself. It was also the concept of the 1892 drafters of the Canadian Criminal Code, a code now fully comprehensive as regards the Special Part³ but not fully comprehensive in its General Part which omits some defences (intoxication and necessity), makes no reference to general principles of liability, but leaves these matters to the common law.

8. Secondly, a Code may be seen as not only comprehensive but also systematic. This seems to have been the view of Macaulay, Wright and Stephen, who clearly sought to give their Codes an orderly and systematic arrangement. This appears nowhere more clearly than in Stephen's precursor to his Code, i.e.: in his mini-code on homicide, which begins by categorizing homicides as lawful and unlawful and builds further rules upon that basis. Likewise the Canadian

Criminal Code aimed - and still aims - at a measure of system and order, although successive amendments have obscured its general thrust.

9. Thirdly, unlike a tax act for example, a Code typically paints with a broad brush. It speaks on the whole in general terms, leaving details to be filled in later by law doctrine in civil law countries or by the courts in common law jurisdictions. For in a sense - and this is especially true of criminal law - it speaks to lay people (citizens, jurors, witnesses) rather than to experts. This was true of the 19th century draft Codes referred to above, is true of the Model Penal Code, and is true in part, but only in part, of the Canadian Criminal Code.

10. In our draft outline Code, therefore, we would draw attention to the questions of comprehensiveness, arrangement and style.

(1) Comprehensiveness

11. A comprehensive code must (a) include everything that should be contained in it, and (b) exclude everything that should not be contained in it.

(a) Inclusions

As to offences, Canada has essentially a comprehensive Criminal Code, except for the matters mentioned in footnote 2 above. These apart, all offences are in the Code or statute and none are left to common law. As to defences, the Code is not wholly comprehensive. Many defences are included but some, like necessity and intoxication, are not. And as to general principles of liability - general rules concerning the physical and mental elements of crimes - the Code is absolutely silent. To remedy this lack of complete coverage, our outline Code includes principles of liability, all the recognized general defences and all the offences.

(b) Exclusions

The present Code contains many matters which should, it is argued, be excluded. For instance, the provision on impaired driving is buttressed by a mini-code of procedure concerning the breathalyser, the provision on abortion by a mini-code on therapeutic abortions, the provision

on firearms by a mini-code of exceptions and requirements, and the provision on electronic surveillance by a mini-code on procedures. Necessary as these are, it is doubtful whether their rightful place is in the general text of the Criminal Code. Just as no Criminal Code should fill the chapter on Theft and Fraud with a code of all the rules on property contained in other areas of law, so too no criminal code should fill the driving offences, etc. with mini-codes like those described above. Rather, they should, like all provisions primarily directed at specialists, be removed to an accompanying schedule as is our normal statutory practice in Canada.

For these reasons our outline code removes from its general text all these ancillary provisions.

(2) Arrangement

12. A true code needs orderly and systematic arrangement. Here again, in outline our present criminal code is by no means completely unsatisfactory: it divides into a General

Part (Part I) and a Special Part (Part II - X), the former containing rules of general application and the latter containing rules concerning specific offences. Detailed arrangement, however, leaves much to be desired: various general matters are dealt with in Parts II - X various specific matters are dealt with in Part I and the presentation of Parts II - X themselves is open to improvement.

13. In our view a new Code should be divided into two main parts. First, there should be a general part containing all the laws relating to application, jurisdiction, liability, defences, participation and inchoate offences. Second, there should be a special part divided into sub-parts classifying all the various offences according to a logical and coherent plan.

(a) The General Part

14. In W.P. 29 (pp: 5 - 6) we outlined the structure of a proposed General Part as follows:

- I Objects and Principles
- II Application and Jurisdiction

- (1) Classification of Offences
- (2) Interpretation
- (3) Provisions concerning time
- (4) Jurisdiction
- (5) Principle of legality

III Liability and Defences

- (1) Liability
- (2) Defences
- (3) Corporate Liability

IV Participation

V Inchoate Offences

- (1) Attempt
- (2) Incitement
- (3) Conspiracy

15. The main difference here from the present Code is the location of inchoate offences. In the present Code, they are dealt with in Part XI, i.e.: after the Special Part. Here, in view of their general nature, they are placed firmly within the General Part.

(b) The Special Part

16. Orderly and systematic arrangement of the Special Part involves three different but related tasks. First the various offences must be divided into different groups. Second, the different groups must be set out in some logical order within the Special Part itself. And third, the offences in each group must then be set out in some logical order or gradation.

(i) Grouping the Offences

On grouping or classifying, two things must be borne in mind. First, the classifier is trying to "carve the world at its joints", whereas the world may not come so neatly jointed. Second, all classification is ultimately a matter of convenience to serve the needs of those for whom it is undertaken.

To take the first point, any classifier is trying naturally to classify reality as it is - he is trying to divide his material into its component parts. Unfortunately reality may not always be divisible into clear watertight compartments -

some items belong to more than one compartment. To take a criminal law example, given the traditional division of offences into crimes against the person and crimes against property, where is the place for a hybrid like robbery? Classifiers should not impose on their material a tighter logic than that material reflects.

This brings us to the second point. The goal of classification, after all, is mere convenience - we want to set out the material in some orderly way in order to render it more graspable, more understandable and so, more manageable.

So, in the final analysis, practical convenience rather than pure logic must be our criterion. The answer to the question, 'where should we put robbery?', will depend ultimately on user's convenience.

17. Traditionally, common lawyers have divided criminal offences into three groups - offences against the person against property and against the state. Although a natural and obvious classification, this uses larger groupings than

are useful. It certainly draws no distinction between offences against society and offences against the state, i.e.: the organized society.

18. A better approach surely is Stephen's. In his Digest he divides crimes into the following broad categories: -

Offences Against Public Order - Internal and External;
Abuses and Obstructions of Public Authority;
Acts Injurious to the Public in General;
Offences Against the Person, etc.; and
Offences Against Rights of Property, etc.

19. To a large extent this is the basis of the grouping of our present Criminal Code. Parts II - X of that Code are entitled as follows: -

II Offences Against Public Order
II.1 Firearms
III Offences Against the Administration of Law and
Justice
IV Sexual Offences, Public Morals and Disorderly
Conduct
IV.1 Invasion of Privacy

- V Disorderly Houses, Gaming and Betting
- VI Offences Against the Person and Reputation
- VII Offences Against Right of Property
- VIII Fraudulent Transactions Relating to Contracts
and Trade
- IX Wilful and Forbidden Acts in Respect of Certain
Property
- X Offences Relating to Currency

20. In some ways this arrangement is less satisfactory than Stephen's. In the first place groups II.1 and IV.1 have simply been tacked on to an already existing classification. Secondly, some of these eleven classes of offences could group together to produce larger classes - VII, VIII, and IX, for instance, seem to form part of a larger category of offences against rights of property.

21. In one respect, however, both arrangements are out of date. Neither finds room for certain offences now seen as significant in their own right. Offences against the environment should surely figure as a special class in any modern code of criminal law.

22. In our view the overall grouping of offences must be broad enough for easy grasp, yet detailed enough to indicate the contents with some particularity. To this end we would suggest a classification similar to that advanced by Stephen, as follows: -

Crimes Against the Person

Crimes Against Property

Crimes Against the Environment

Crimes Against Society (the Public in general

Crimes Against the State (State security, Public authority, etc.)

Crimes Against the International Community of States

(ii) Ordering the Groupings

The ordering of the different groups of offences is also a matter of convenience. The traditional common law ordering was: (1) offences against the person, (2) offences against property, and (3) offences against the state. The ordering advanced by Stephen and built on in our code gives pride of place to crimes of treason and other offences against public order.

23. Much can be said for this approach. Clearly the major crime of all concerns frontal attacks on the whole legal and political order. High treason, mutiny, sedition, and so on can easily be supported as the prime category on the list.

24. On the other hand the common law tradition has much in its favour. First, the prime prerequisite for any social life is restriction on killing and other personal violence, and the most worrying crimes for potential are murder, wounding and so on. Second, the commonest criminal offences are property offences of dishonesty - our usual image of the criminal is that of a thief, robber or burglar.

25. Accordingly, our outline follows common law tradition. It starts with crimes against the person. Next it lists crimes against property. It then deals with crimes against the state and against the international community.

26. After the first two categories, however, our outline inserts offences against the environment, which in our view warrant a category of their own and which can be most logically located in this position. The view that environmental offences warrant a separate category is now becoming conventional wisdom. For while till now their

criminalization has largely been based on the potential danger to human life, founded on the notion of the utility of the environment to human beings and largely articulated in terms of public nuisance, today it is being agreed to in the light of recognition of the environment as something having a value in itself. And the logical location - after offences against the person and against property - reflects the fact that in real life, in terms of people, property and the environment, the theatrical trio of elements consists of characters, props and stage.

27. Finally, the last three classes of offences in our outline fall naturally into the order suggested. The simplest combination of people is a shared society, hence in the next place come some offences against society in general. Built out of this shared society arises the state, the politically organized society. Hence, in the following place come offences against the state. Lastly, built out of states arises the international community. Hence, in the final place come offences against the international community.

(iii) Grading Offences in Each Group

Within each group, the offences must be put in

some coherent order. One ordering would be to start with the most heinous offence, to continue with offences decreasing in gravity and to end with the least serious offences. With offences against the person we could start with murder, continue with manslaughter and wounding and ending with simple assault. The advantage is that of starting with the "flagship" offences.

An alternative ordering would be to start with the least serious offences and build on up to the most serious. With offences against the person, we could start with simple assault and build on up to murder. The advantage is that of starting with the simplest and qualitatively most conspicuous offences and building up to aggravations of those simpler offences. Yet, another ordering may be desirable in some instances. In a given category of offences there may be one offence on which several others are piggy-backed. In crimes of dishonesty, for instance, robbery is piggy-backed on theft. This has the advantage of starting with the foundation offence.

28. No particular ordering, however, has to be used in every category. Maybe the most appropriate method for fatal crimes against the person is the first alternative; for non-fatal crimes against one person, the second alternative, and for property crimes, the third alternative. Sometimes symmetry and homogeneity should give way to convenience.

29. In our view the Special Part should be set out as follows:

I Offences Against the Person

(1) Against Life

Murder

Reckless Homicide

[Negligent Homicide]

Aiding Suicide

Offences against Life of the Unborn

Dead Bodies Offences

Suicide

(2) Against Bodily Integrity

Assault

Battery

Causing Bodily Harm

Aggravated Forms of the Above Three Offences

(3) Against Sexual Integrity

Sexual Interference

Sexual Aggression

Sexual Interference with Under-Aged

(4) Against Liberty

Intimidation

Frightening

False Imprisonment

Abduction

(5) Against Safety

(Negligent Causing of Bodily Harm)

Conduct Endangering Life

Criminal Nuisance

Specific Offences, e.g.: relating to

- explosives

- dangerous substances

- motor vehicles

- ships

- aircraft

- rescue

- (6) Against Privacy
 - Trespass, etc.
 - Break and Enter
 - Wiretap Offences

II Offences Against Property

- (1) Destruction and Damage
 - Vandalism
 - Arson

- (2) Deprivation by Dishonesty
 - Theft
 - Dishonest Borrowing
 - Fraud
 - Robbery
 - Blackmail

- (3) Related Offences
 - Unlawful Possession
 - Forgery

III Offences Against the Environment

This would be a new heading in the Code, but one whose time, in our opinion, has now come. At this

time we are not in a position to delineate its contents with precision, particularly since it is at present being studied by another project. Tentatively we suggest that the topic might be divided along the following lines:

- (1) Offences Involving Destruction
- (2) Offences Involving Damage (Pollution)
- (3) Offences Involving Waste
- (4) Offences against "Quiet Enjoyment" (e.g.:
Noise)
- (5) Offences against Animals (as res in rerum
natura)

Two Caveats:

- (1) The above headings are merely tentative - pegs for the Protection of Life Project to use as they see fit and as they find helpful.
- (2) Their listing is not meant to commit the new Code necessarily to the inclusion of any of the above offences.

IV Offences against Society

(1) Against Peace

(breach of the peace)

unlawful assembly

riot

duelling and prize-fights

weapons (including firearms) offences*

forcible entry and detainer

public mischief

hate propaganda

*Use of weapons may aggravate offences of violence or dishonesty. The offences here are meant to cover mere carrying, brandishing etc. which are in themselves alarming, dangerous and likely to result in breaches of the peace.

(2) Against Justice

Misleading Justice (Perjury, etc.)

Defeating Justice

(Compounding, Influencing Jurors, etc.)

Corrupting Justice

(Bribery of Judges, etc.)

(3) Against Social Institutions

Against Marriage and Family

(Bigamy, etc.)

Against Credit

(Coinage, Currency and Stock-exchange

Offences)

Against Communications

(Interference with Mail, Mass Media and

Transport)

(4) Against "Public Morality"

This heading relates to a highly controversial area of offences. At present we tentatively suggest that they fall roughly into two categories as follows: -

(i) Conduct Offending against Decency, etc.

Indecency Offences

Obscenity

Blasphemy

Disorderly Conduct

Offences concerning Prostitution

(ii) Conduct Undermining Social Values

Gambling and Lotteries

Drug Use and Traffic

Corruption and Exploitation

(e.g.: Obscenity and Children,

Living off the Avails of

Prostitution)

Category (1) offences are based on a rough concept of nuisance, while category (2) offences are based on a notion of immorality involving social harm.

V Offences against the State

(1) Against internal security

treason

mutiny

(seditious behaviour)

sabotage

official secrets (1)

(2) Against external security

espionage offences

official secrets (2)

assisting enemies (e.g. trading with)

(3) Concerning citizenship

illegal entry

passport offences

(4) Against government and state institutions

Offences against the Monarch,

Governor-General, etc.

Offences against Parliament and legislatures

Offences against Courts (contempt etc.)

Escape

Offences against, concerning and by

. police

. armed forces

. public servants

Offences against revenue (tax evasion,

smuggling, etc.)

Offences concerning public stores (theft from)

Offences concerning records, etc.

(destruction, falsification)

Offences concerning boundaries

VI Offences against International Law, etc.

piracy

hijacking

offences against protected persons

foreign enlistment

war crimes

genocide

(3) Style

30. Readers of our outline code will notice its relatively simple style. This results from our concentration first and foremost on the content of each rule, rather than on the form, so as to avoid getting mired in drafting details. The rules as drafted could later be translated into the usual "legalese", if so desired.

31. Our own strong recommendation would be against such translation. First, while the law should be as clear, certain and comprehensive as possible, these goals compete with one another. Unfortunately, desire for certainty often leads to loss of clarity. Yet clarity may be as relevant as certainty to the rule of law. If the idea of the rule of law is to enable the citizen to know where he stands, even

so the law must not be so certain in all its details as to become incomprehensible to the ordinary citizen, because then he still does not know where he stands. Hence the need for clarity in law in general but in the criminal law in particular, "which as Dickson J. observed in Leary (1978) 1 S.C.R. 29 at 42, should be characterized by clarity, simplicity and certainty".

32. Clearly our criminal law is more complex and less clear than it might be and this has drawbacks. It means that the law is not intelligible to the ordinary citizen to whom it is addressed. It creates difficulties for jurors who must apply it. It places a heavier burden on judges who must explain it to them. It complicates life for law enforcers who are not legally trained but have to have a good grasp of that law.

33. The reasons for this complexity are many. They relate to the use of technical terms, of involved phraseology, of complex sentence structure, of indirect location and specific detail instead of general principle.

34. Technical terms make law complex because, not being readily intelligible to the ordinary citizen, they need to

be translated into ordinary language. This must either be done by definitions in the code which thereby add to its length and detail, or by explanations by judges to juries which lengthen the time of trial. Our present theft law, for example, uses the terms 'fraudulently' and 'colour of right', which judges then explain (according to many of the judges we consulted) by telling juries that the basic question is whether the accused acted dishonestly. Would it not, then, be simpler and more straightforward to define theft law itself, as we suggested in our Report, in terms of dishonesty?

35. Involved phraseology complicates the law by burdening the reader or the juror with concepts that are difficult to hold in mind. In s. 290(2) for instance of the present Code the following phrases are used as subjects of grammatical clauses:

'A proper entry in that account of the thing received or the proceeds or part of the proceeds of it';

and

'no fraudulent conversion of the thing or the proceeds or part of the proceeds of it thereby accounted for'.

This heavy type of phrasing, typical of legal documents but quite foreign to present day speech and writing, baffles the eye, wearies the brain and adds to the burden of legal interpretation.

36. Complex sentences impede comprehension by reason of excessive embedding of subordinate clauses. For instance s. 290(2) of the present code contains a sentence with four levels of clauses. It begins with a subordinate clause with two limbs, viz.

- (1) "where subsection (1) otherwise applies",
- and
- (2) "and one of the terms is that".

In limb (2) it embeds two that-clauses, viz.

- (a) "that the thing ... shall be an item ... between the person ... and the person".
- and
- (b) "that the latter shall rely ... in respect thereof".

Meanwhile in the first that-clause, i.e.: clause (a), there are two relative clauses, viz.

- (1) "who receives the thing" which qualifies the first use of "person", and

- (2) "To whom he is to account for it" which qualifies the second use of person. Finally, after six lines of all this, it gives us the main clause which itself has a further clause embedded in it. Linguists point out that there is a limit to what the mind can retain and therefore also to the intelligibility of such embedding. In our view, sentences like this one have clearly reached that limit.

37. Next, indirect locution. As everyone knows, the direct way of saying anything is the simplest, the clearest and the most readily understandable. If, therefore, legislators wish to restrict criminal homicide to the killing of those already born, they should do so by stating this directly and not, as does our present Code, by providing that homicide is the killing of a human being and by then defining 'human being' in such a way as to exclude the unborn. By the same token, if legislators wish to allow a peaceable possessor of property to use reasonable force to remove trespassers, they should say this directly and not,

as does our present Code, by deeming a resisting trespasser - who may after all resist in merely passive fashion - to commit an assault (See Working Paper 29, The General Part, pp. 106 - 107).

38. Finally, the matter of specific detail as a substitute for general principle. The law of homicide, for instance, categorizes first degree murder by listing several different but seemingly unrelated kinds of killing - premeditated, done for gain, repeated and so on. Nowhere does it attempt to justify this classification by reference to any general feature such as the one suggested in our forthcoming Working Paper on homicide, viz. the deliberate subordination of the victim's life to some purpose of the offender's. Likewise the present law relating to duress, which rules this out as a defence to certain crimes, provides merely a list of offences - high treason, treason, murder, piracy, attempted murder, assisting in rape, forcible abduction, robbery, causing bodily harm and arson. (Criminal Code s. 17) No general characteristic is described such as the one we suggested in Working Paper 29, The General Part at p. 87 - "unless his conduct manifestly endangers life or seriously violates bodily integrity". In our view, articulating general principles instead of listing details not only gives

the citizen a rationale for the law but also makes that law more readily intelligible and more mentally retainable.

39. Accordingly, in order to avoid such complexity, our outline Code uses ordinary words like "dishonesty", simple phraseology and easy sentence structure. It avoids indirect locution and deeming provisions. Lastly, it strives for rationale and principle rather than enumeration and detailed rules.

40. One last observation. An enemy to simplicity is the marginal case. A case may be marginal because the draftsman failed to foresee it. As H.L.A. Hart and others have shown, however, such cases can never be completely foreseen and dealt with in advance. So rather than try to cope with the problem by drafting in even finer detail, legislators should articulate a general principle, draft in terms of that principle and leave such cases to be dealt with by the courts as they arise. Law should not be structured around the marginal case.

41. Alternatively, a case may appear marginal because it calls for judgement and assessment by reference to some standard. Is this sort of conduct dishonest? Is it really

negligent? Is it really reckless? No laws however tightly drafted can remove this sort of burden from the trier of fact. Again, rather than try in vain to do so, legislators should draft in terms of principle and leave these to the judgment of the trier of fact.

II - QUESTIONS FOR DISCUSSION

(1) Comprehensiveness

42. The outline code is based on the assumption that only "real crimes" should be included in it. The concept of distinguishing "real crimes" and "regulatory offences", as advocated in Our Criminal Law, has been accepted as a part of government policy in Canada. That policy envisages a criminal code of "real crimes" and another code governing "regulatory offences". Detailed categorization of offences into these two classes is accordingly proceeding in the Department of Justice (the Federal Statutes Compliance Project).

43. In this connection two questions arise:

- (1) Regulatory offences typically consist in careless failure to comply with legal requirements, (e.g.: to send in within a prescribed time a required form). But where such failure results not from carelessness but rather from deliberate intent (e.g.: for the purposes of fraud), it clearly merits greater penalty and in fact could qualify

as a "real" crime. So, should regulatory offences committed with fraudulent intent, for instance, be cross-referenced in the Criminal Code? For example, should fraudulent failure to disclose income under a Tax Act qualify as a "real" crime and should the fraud chapter in the Criminal Code include a provision covering fraudulent non-compliance with enumerated statutes? Or should there be a blanket fraud provision covering dishonest non-compliance with any statutory provision?

- (2) Should mini-codes of regulations be removed from the Criminal Code? If so, where is their most appropriate place? Clearly the unlawful possession of firearms should be included in the Code, but what about the regulations determining when their possession is lawful and unlawful? Should they be placed, say, in a separate schedule to the Code?

(2) Arrangement

44. The outline Code is based on the concept that the

central crimes are violations of fundamental social values. Provisions on these crimes would then be buttressed by further provisions on:

- (a) the aggravated offences;
- (b) "anticipatory" offences (e.g.: break and enter needs supplementing by unlawful possession of housebreaking implements); and
- (c) complementary offences (homicide needs supplementing by concealment of dead body, etc.).

Does this approach seem appropriate?

(3) Style

45. Here we acknowledge that rules of procedure addressed to experts need not be so simply written as the substantive code. As to the latter, how far would a plain language code be workable in practice? How far would lack of "legal" appearance militate against credibility?

(4) Scope

46. Clearly, when people talk of a code, whether the Criminal Code of Canada, the Model Penal Code or the New York Code of Criminal Law, they mean something more than just a Statute. They mean a self-contained body of legislation expounding and systematizing certain principles and rules and providing for their application. In other words, those interpreting the code should not need to resort to extensive matters such as previous law. In short, the code should supersede customary law and provide for its own rules of interpretation.

(a) Abolition of the Common Law

47. In a Common Law system, judges not only interpret legislation but can also create additions to it. In Canada, judges as regards the criminal law no longer create new offences⁴ because s. 8 of the present Code restricts creation of offences to statutory enactments. They can still, however, create new defences because s. 7 maintains in force every Common Law principle or rule providing for an excuse, justification or defence unless inconsistent with statute law. The question, then, is whether, in a new Code,

the rule provided by present s. 8 on offences should be paralleled by an analogous rule relating to defences - should judicial creativity be ruled out completely?

48. Admittedly, fundamentally different considerations apply to present s. 7 from those applying to s. 8. The latter section can be justified by the doctrine of the rule of law; judicial *ex post facto* creation of offences is objectionable because the individual should not be subject to state interference except as authorized by already existing law. Judicial creativity of defences is not open to the same objection, because, rather than subjecting the individual to such interference, it shields him from it.

49. On the other hand judicial creativity, even in the matter of defences, is not wholly reconcilable with the concept of a code. That concept centres round the idea of comprehensiveness. The law on the subject in question is all to be found within the codifying document and not outside it - neither in prior nor subsequent case law. So, given a code in this full sense, judicial creativity as allowed by the present s. 7 comes to an end. At most the courts, as in a civil law jurisdiction, could only work within this document, i.e.: by virtue of interpretation.

As we said in our Report on Evidence at p. 51, "An attempt has been made to cover all matters that are strictly evidence law, but anything that remains is by this section to be determined reasonably in the light of experience to secure the purpose of the Code. Precedent is, of course, a major source of experience and may be looked to, but it will not have binding force. The completeness of treatment made possible by this section makes the rules a code."

50. The question is, how far would it be desirable for a code to exclude such judicial creativity? If so, how would it be possible? And, if so, how exactly should the Code provide for it?

(b) Interpretation

51. Regardless of the answers to that question, there still remains the question of interpretation. At present the Code must be interpreted in the light of

(1) its own definitions;

(2) The Interpretation Act, and particularly s. 11 which provides: "Every enactment shall be given

such fair, large and liberal construction and interpretation as best ensures the attainment of its objects; and

- (3) Common law decisions on relevant matters and particularly on statutory interpretation. How far should this state of affairs survive the enactment of a true code in the full sense?

52. In our view, the comprehensiveness required of such a code demands that its interpretation should be self-contained within it. A true code must be master of its own concepts and its own construction. This means first that such terms as need definition must be defined within the Code. It means secondly that the kind of interpretation required must also be laid down within the Code.

53. Our question, then, is how far is that view practicable; how far can a code control its own interpretation in a common law world? What sort of interpretation rules could achieve this? And how far could judicial interpretation be prevented from possibly distorting the code by interpretations given the force of binding precedent?

(5) Strategy for Continuation and Implementation

54. Law reform is commonly thought of as involving two stages. The first is that of waiting out the reforms and putting it into legislative format. The second is that of seeing through the enactment of the proposed legislation.

55. The first stage is clearly that belonging par excellence to a reform commission. The second belongs more clearly to the government of the day, the relevant government departments and to Parliament. The question is, however, whether a commission should have input into the second stage and whether the departments should have corresponding input into the first stage?

56. Naturally a commission will want to bear in mind, in its reform deliberations, the practical aspects and possibilities of legislative implementation. For that reason it will obviously draw informally on the advice and expertise of those concerned within the government. This has been done, we believe, in other countries and in other jurisdictions.

57. Naturally a government bent on implementing a code prepared by a commission will want to be fully informed of the aims, thrust and general thinking behind that code. For this reason it will want, informally at least, to have members of that commission available for advice and consultation when it comes to actual legislation. This, we imagine, will be the case in Canada with this proposed new Criminal Code.

58. Focusing, however, only on the job of a commission, one confronts the question of whether, strictly speaking, a commission which has produced its final draft code has any further mandate. With that production, does it become functus officio? Is it the job of a commission simply to produce its suggested reform, then vacate the field and leave the next step entirely to government and Parliament? Or, given that the reform can only be fully understood and therefore properly implemented in the light of complete awareness of the thinking of reformers, is it the job of a commission to go further than producing the reform and to try to ensure that its reforms go through with the form and content it intended for them?

59. To some extent, this question has already been answered in Canada. While the research stage has been clearly recognized as belonging to the Commission and the legislative stage has been seen as obviously being that of government and Parliament, a bridging stage has been inserted. The practice has been developed of proceeding, therefore, in three phases:

1. Phase (1)

The reforms are researched and worked out primarily by the Commission.

2. Phase (2)

The practical problems of implementing these reforms are worked on and solved - primarily by the Departments of Justice and the Solicitor General.

3. Phase (3)

The reforms are enacted in the light of the work done in Phase (2).

60. One important aspect of the programme is the bridging nature of Phase (2). For while that phase belongs primarily

to the Departments of Justice and Solicitor General, these Departments work in close consultation with the Commission and also with the Attorneys-General of the Provinces, which in Canada have the jurisdictional responsibility of administering the criminal law. In order to facilitate that close consultation, Phase (1) has also developed a process of consultation with the Departments and the Attorneys-General. Meanwhile in Phase (1), the Commission also consults with panels of judges, defence lawyers, police chiefs, law professors and others.

In this context we have two questions:

- (1) Have our consultants any general advice on strategy regarding the "Phase (1) - Phase (2) research-implementation" stage - advice as to consultations, advisory groups etc.?
- (2) On the question of legislation, this Commission's view has always been that its ultimate objection was the production of a criminal code in its entirety. Meanwhile it has been decided to enact part of the Commission's work on an incremental basis as and when those

parts have emerged. In the course of such enactment, however, the Commission's recommendations have been modified in certain respects, regarding content, arrangement and style, partly in order to blend better with the present Code and partly insofar as there is divergence in viewpoint between Phase (1) and Phase (2). Accordingly, the process is becoming incremental in two senses - incremental in time and also incremental in approach and substance. Our question, then, is: What, in the view of our consultants, does this mean for the achievement of the initial purpose behind the establishment of this Commission?

Note: Pages 47 to
133 are on yellow
pages in the original

CRIMINAL CODE OUTLINE

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PRELIMINARY NOTES

1. Many sections in the present outline are based on work already done by the Commission. The sources of such sections are identified by a reference to a Report (R) or a Working Paper (W.P.). For convenience, however, the drafting is a simplified version of that contained in the reports or working papers. The changes are not meant to reflect on the substance.
2. Where no such reference appears, the draft is merely tentative, as are the labels "crime" and "misdemeanor" used, pursuant to section 2.01, throughout the outline, and also any words between brackets [].

PREAMBLE

WHEREAS Canada is now a fully independent self-governing state;

AND WHEREAS the fundamental laws of Canada are now enshrined in the Constitution of Canada, which Constitution contains the Canadian Charter of Rights and Freedoms;

AND WHEREAS it is now meet and fitting that the criminal law of Canada should be articulated in a new, remodelled and fully comprehensive Code.

NOTES

BOOK ONE - GENERAL PROVISIONS

PART I - OBJECTS AND PRINCIPLES

- | | |
|-----------------------------------|--|
| Title | 1.01 - This Act may be cited as the Criminal Code. |
| Principles
of Criminal
Code | 1.02 - The Criminal Code is based on the following principles:
<ul style="list-style-type: none">(1) Criminal law is an instrument of last resort;(2) As such, criminal law should be used with restraint;(3) Criminal law should serve primarily to underline basic social values;(4) Criminal law should do this by<ul style="list-style-type: none">(a) stigmatizing conduct seriously violating such values, and(b) allowing exemptions, justifications, excuses and other exceptions in accordance with such values;(5) In doing this, criminal law should speak as clearly as possible to the citizen; and(6) Criminal law should also make its proscriptions as certain as possible. |

NOTES

PART II - APPLICATION AND JURISDICTION

- Classification of Offences 2.01 - Offences are:
- (a) crimes (punishable by not more than _____ years' imprisonment, unless otherwise provided) or
 - (b) misdemeanors (punishable by not more than a fine of _____ dollars or _____ months' imprisonment or both, unless otherwise provided).
- Principles of Interpretation 2.02 - (1) All enactments relating to offences shall be interpreted according to the ordinary meaning of the words used.
- (2) All ambiguities in such enactments shall be resolved in favour of the defendant.
- Application in Time 2.03 - (1) Lapse of time is no bar to prosecution for a crime.
- (2) No one shall be prosecuted for a misdemeanor more than six months after its commission.
- Application in Space: 2.04 - (1) Subject to the following section, no offence committed entirely outside Canada is within the jurisdiction of any Canadian court.
- (2) For the purpose of this section "Canada" includes the Canadian Arctic, the territorial sea of Canada, the airspace above Canada, and any Canadian ship or aircraft.

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Exceptions

(3) Notwithstanding subsections 1 and 2, the following offences may be tried by Canadian courts:

(A) when committed by any person anywhere:

- (a) piracy;
- (b) other piratical acts;
- (c) offences against internationally protected persons;
- (d) forging a Canadian passport or uttering a forged Canadian passport;
- (e) fraudulently using a certificate of Canadian citizenship;
- (f) offences against Canadian currency.

(B) when committed by any person in special places:

- (a) any offence against a Canadian citizen in a fishing or economic zone of Canada;
- (b) any offence on or within one mile of any structure, rig, etc. used for exploitation of the continental shelf of Canada or under the control of the Crown in right of Canada;
- (c) hijacking, or violence on board or endangering an aircraft in flight if
 - (i) it lands in Canada with the offender on board, or
 - (ii) the offender is found in Canada and not extradited in accordance with Canada's treaty obligations.

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(C) when committed by citizens:

- (a) treason;
- (b) any offence committed in a fishing zone, economic zone or continental shelf of Canada.

(D) when committed by special persons anywhere:

- (a) any offence by federal public servants of Canada serving outside Canada, being an offence under the law applying to the place of its commission;
- (b) any offence by a Canadian person subject to the Code of Service Discipline under the National Defence Act;
- (c) any offence by a person serving as a member of the RCMP.

Immunities	2.05	-	[NOT DRAFTED]
Burdens of Proof and Presumptions	2.06	-	[NOT DRAFTED]
General Definitions	2.07	-	[NOT DRAFTED]

NOTES

PART III - LIABILITY AND DEFENCES

1. LIABILITY

- | | | |
|------------------------------------|------|---|
| Requirements of Criminal Liability | 3.01 | - No one is criminally liable for any offence unless he commits it or is a party to its commission. (W.P. 29). |
| Commission of Offences | 3.02 | - No one commits an offence unless his conduct falls under the definition of that offence. (W.P. 29). |
| Restriction Concerning: | 3.03 | - Definitions of offences shall be so interpreted that no one shall be taken to commit or be a party to any offence merely by reason of behaviour |
| Compulsion | | (1) consisting of an act due to physical compulsion, or |
| Impossibility | | (2) consisting of an omission due to physical impossibility, or |
| Automatism | | (3) of an unconscious nature due to temporary disturbance of mind resulting from external factors sufficient similarly to affect an ordinary person (not being due to mental disorder, intoxication or provocation). (W.P. 29). |
| Mental Element as to: | 3.04 | - Definitions of offences shall be so interpreted that, unless otherwise provided, no one commits an offence, |
| Act | | (1) by reason of an act unless in doing it he knows the circumstances specified in the definition of that offence; |
| Omission | | (2) by reason of an omission unless he fails to perform a duty imposed by this Code and knows the circumstances giving rise to such a duty; |
| Situation | | (3) by reason of any other situation (including possession) specified in the definition of that offence unless he knows the circumstances specified in that definition; |

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Consequence (4) by reason of a consequence specified or implied in the definition of that offence unless he knows that he is substantially likely to cause that consequence, or

Purpose (5) by reason of a purpose specified in the definition of that offence unless in fact he has that purpose. (W.P. 29).

Mistake of Law: General Rule 3.05 - (1) Subject to the provisions of this section mistake or ignorance of law is no defence.

Private Rights (2) Every one charged with an offence is excused from criminal liability for that offence by mistake or ignorance of law concerning private rights where knowledge of such rights is relevant to that offence.

Reasonable Mistake or Ignorance of Law (3) Every one is excused from criminal liability by reasonable mistake or ignorance of law resulting from

(a) non-publication of such law;

(b) reliance on judicial authority, and

(c) except for offences governed wholly by the Criminal Code, reliance on administrative authority. (W.P. 29).

Mistake of Fact: General Rule 3.06 - (1) Subject to the provisions of this section, no one charged with an offence is criminally liable for that offence if he acted under such mistake or ignorance of fact that on the facts as he perceived them his conduct would not have constituted that offence or he would have had a justification, excuse or other defence allowed by law;

Offence Created by Same Enactment (2) where on the facts as he perceived them, an accused would have committed an offence created by the same section as the offence charged, he shall be convicted of the offence charged;

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- Included Offence (3) where on the facts as he perceived them, an accused would have committed not the offence charged but an included offence, he shall be convicted of that included offence;
- Offence Created by Different Enactment (4) where on the facts as he perceived them, an accused would have committed an offence which, not being an included offence, is created by a section other than that of the offence charged, he shall be convicted of an attempt to commit that other offence;
- Wilfull Blindness (5) where an accused suspects that certain facts are highly likely to exist but abstains from ascertaining them, any resulting mistake or ignorance of fact will not negate his criminal liability;
- Reasonable Mistake in Non-Code Offences (6) unless otherwise provided, as regards offences other than those in the Criminal Code, mistake or ignorance of fact will not negate criminal liability unless the accused proves that such mistake or ignorance was reasonable. (W.P. 29).
- Legal duties 3.07 - [NOT DRAFTED]
- Causation 3.08 - [NOT DRAFTED]

2. DEFENCES RELATING TO CULPABILITY

- General Principle 3.09 - Notwithstanding that a person's conduct falls within the definition of an offence or constitutes being a party to that offence, he is not criminally liable if he has an exemption, excuse, justification or other exception allowed by law. (W.P. 29).

NOTES

A) EXEMPTIONS

- Immaturity 3.10 - (1) (a) Everyone under 12 years of age is exempt from criminal liability for his conduct.
- (b) Everyone over 12 and under 14 years of age is exempt from criminal liability for his conduct unless he appreciates the nature, consequences and moral wrongfulness of such conduct and has substantial capacity to conform to the requirements of the law. (W.P. 29).
- Mental Disorder (2) Everyone is exempt from criminal liability for his conduct if it is proved that as a result of disease or defect of the mind he lacked substantial capacity either to appreciate the nature, consequences or moral wrongfulness of such conduct or to conform to the requirements of the law. (W.P. 29).

B) EXCUSES

- Intoxication: 3.11 - (1) (a) Unless otherwise provided, everyone is excused from criminal liability for an offence committed by reason of intoxication by alcohol or other drugs.
- General Rule
- Criminal Intoxication (b) Everyone excused under paragraph (a) of this subsection shall be convicted of Criminal Intoxication under section 4.04 of this Code unless there is evidence that his intoxication was due to fraud, duress, physical compulsion or reasonable mistake. (W.P. 29).
- Duress 3.11 - (2) Everyone is excused from criminal liability for an offence committed by way of reasonable response to threats of serious and immediate bodily harm to himself or those under his protection unless his conduct manifestly endangers life or seriously violates bodily integrity. (W.P. 29).

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- Necessity 3.11 - (3) Everyone is excused from criminal liability for an offence committed out of necessity arising from circumstances other than unlawful threat or attack provided
- (a) that he acted to avoid immediate harm to persons or property;
 - (b) that such harm substantially outweighed the harm resulting from that offence; and
 - (c) that such harm could not effectively have been avoided by any lesser means. (W.P. 29).

C) JUSTIFICATIONS

- Self-Defence:
General Rule 3.12 - (1) (a) Subject to the provisions of this section, everyone is justified in using no more force than necessary to protect himself or any one under his protection against unlawful force, provided that the force used is proportionate to the harm apprehended from the unlawful force.
- Restriction
Concerning
Lethal Force (b) No one is justified in using force which he knows is likely to cause death or serious bodily harm in defending himself against acts, including illegal arrest, done in good faith for the enforcement or administration of law.
- Restriction
Concerning
Aggressor (c) No one is justified in using force which he knows is likely to cause death or serious bodily harm to repel an attack by a person whom he has unjustifiably attacked or provoked unless he does so under reasonable apprehension of death or serious bodily harm from the attacker and did not attack or provoke him with the purpose of causing him death or serious bodily harm. (W.P. 29).

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Protection of Movable:
General Rule 3.12 - (2) (a) Subject to the provisions of this section, everyone in peaceable possession of movable property is justified in using no more force than necessary to prevent another from taking it or to recover it from another who has taken it.

Restriction Concerning
Absence of Claim of Right (b) No peaceable possessor without a claim of right is justified in using force to defend his possession of movable property against a person entitled as against him by law to its possession.

Restriction Concerning
Serious Bodily Harm (c) No peaceable possessor is justified merely by reason of subsection (a) of this section in using force which he knows is likely to cause serious bodily harm.

Peaceable Possessor (d) For the purpose of this section "peaceable possessor" includes a person endeavouring to recover possession immediately after he has been deprived of it. (W.P. 29).

Protection of Immovables:
General Rule 3.12 - (3) (a) Subject to the provisions of this section, everyone in peaceable possession of immovable property is justified in using no more force than necessary to prevent another from trespassing on it, to remove a trespasser from it or to defend his possession against any other person entering to take possession of it.

Restriction Concerning
Absence of Claim of Right (b) No peaceable possessor without claim of right is justified in using force to defend his possession of immovable property against persons entitled by law to its possession and entering peaceably by day to take possession.

Restriction Concerning
Serious Bodily Harm (c) No peaceable possessor is justified merely by subsection (a) of this section in using force which he knows is likely to cause serious bodily harm. (W.P. 29).

NOTES

- Law Enforcement: General Rule
- 3.12 - (4) (a) Subject to the provisions of this section, everyone required or authorized by law to do anything in the administration or enforcement of the law is, if acting on reasonable grounds, justified in doing it and in using no more force than necessary for that purpose.
- Rule Concerning Lawful Arrest and Dangerous Offences
- (b) Without restricting the generality of paragraph (a), everyone is justified in
- (i) effecting lawful arrest
 - (ii) preventing offences endangering life, bodily integrity, property or state security, and
 - (iii) using no more force than necessary for these purposes.
- Execution of Lawful Process
- (c) Everyone required or authorized by law to execute a process or carry out a sentence is, if acting in good faith, justified under this section despite defect or lack of jurisdiction concerning such process or sentence.
- Restriction Concerning Bodily Harm
- (d) No one is justified by this section in using force which he knows is likely to cause serious bodily harm except when necessary
- (i) to protect himself or those under his protection from death or bodily harm;
 - (ii) to prevent the commission of an offence likely to cause immediate and serious injury;
 - (iii) to overcome resistance to arrest or to prevent escape by flight from arrest for an offence endangering life, bodily integrity or state security; or
 - (iv) to prevent the escape of, or to recapture, a person believed to be lawfully detained or imprisoned for an offence endangering life, bodily integrity or state security. (W.P. 29).

NOTES

Lawful Assistance 3.12 - (5) The justifications provided by this section are available to everyone in good faith assisting, or acting under the authority of, persons acting under these sections. (W.P. 29).

PART IV - GENERAL PRINCIPLES CONCERNING COMMISSION OF OFFENCES

- Attempt 4.01 - [NOT DRAFTED]
- Incitement 4.02 - [NOT DRAFTED]
- Conspiracy 4.03 - [NOT DRAFTED]
- Criminal Intoxication 4.04 - [NOT DRAFTED]
- Unlawful Possession 4.05 - [NOT DRAFTED]
- Participation 4.06 - [NOT DRAFTED]
- Corporations 4.07 - A corporation is criminally liable for wrongdoing
- (1) by a person so highly placed in the corporation that his acts are those of the corporation itself if done within the ambit of the corporate activity; and
 - (2) by agents, servants or other employees acting with express or implied authority given by the corporation and within the scope of that authority.
- Other Entities (3) [NOT DRAFTED]

NOTES

PART V - DEFENCES SAFEGUARDING THE ADMINISTRATION OF JUSTICE

Res Judicata	5.01	-	[NOT DRAFTED]
Double Jeopardy	5.02	-	[NOT DRAFTED]
Res Judicata Proper	5.03	-	[NOT DRAFTED]
Abuse of Process	5.04	-	[NOT DRAFTED]
Entrapment	5.05	-	[NOT DRAFTED]
De Minimis	5.06	-	[NOT DRAFTED]

PART VI - PRINCIPLES OF SENTENCING

6.01	-	[DRAFTED BUT NOT INCLUDED]
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NOTES

BOOK TWO - OFFENCES

PART VII - OFFENCES AGAINST THE PERSON

1. Against Life

- | | | | |
|------------------------------------|------|-----|--|
| Definitions | 7.01 | (1) | For the purpose of the following sections the words "another" and "some other" apply only to persons already born. |
| | | (2) | "Born" means having completely proceeded in a living state from the body of the mother. (W.P. Homicide). |
| Intentional Homicide First Degree | 7.02 | (1) | Everyone commits intentional homicide in the first degree who kills another meaning to kill a person other than himself (or knowing for virtually certain that his conduct will do so) and in so doing deliberately subordinates the intended victim's life to his own purpose. (W.P. Homicide). |
| Sanction | | (2) | [Crime punishable by a minimum penalty - possibly life imprisonment.] |
| Intentional Homicide Second Degree | 7.03 | (1) | Everyone commits intentional homicide in the second degree who kills another meaning to kill a person other than himself (or knowing for virtually certain that his conduct will do so). (W.P. Homicide). |
| Sanction | | (2) | [Crime punishable by a maximum penalty of life imprisonment.] |
| Reckless Homicide | 7.04 | (1) | Everyone commits reckless homicide who kills another through knowingly exposing a person other than himself to a substantial and socially unacceptable risk. (W.P. Homicide). |
| Sanction | | (2) | [Crime punishable by a lesser maximum penalty than that provided for intentional homicide second degree.] |
| Negligent Homicide | 7.05 | - | [NOT DRAFTED] |

NOTES

- Assisting
Suicide
- 7.06 - Everyone who incites or assists another to commit suicide, whether suicide ensues or not, is guilty of a crime and liable to imprisonment for [ten years].
- [the operative words incite and assist will be finalized only after the participation sections are complete].
- Preventing
Birth
- 7.07 - (1) Everyone who prevents the birth of a child already conceived is guilty of a crime and liable to imprisonment for [five years].
- (2) This section does not apply to anyone acting in good faith to preserve the life or health of the mother of the conceived child.
- [This will cover both killing the unborn (Cr.C. s.221), abortion (Cr.C. s.251) and neglecting to obtain assistance in childbirth (Cr.C. s.226).
- N.B. Abortion prosecutions would often in fact be for attempting to commit the offence defined in this section. Neglecting to obtain assistance prosecutions would be possible in view of a duty section in the General Part to cover the mother's duty under Cr.C. s.226 combined with the prevention (or attempt at prevention) of birth.]
- Concealment
of Birth
- 7.08 - Everyone who disposes of the dead body of a child in order to conceal the birth of such child, whether such child died before, during or after its birth, is guilty of a crime and liable to imprisonment for [five years].
- Offences
Relating to
Dead Bodies
- 7.09 - Everyone who
- (a) neglects, [without lawful excuse] to perform any duty that is imposed upon him by law or that he undertakes with reference to the burial of a dead human body or human remains, or

NOTES

(b) improperly or indecently interferes with or offers any indignity to a dead human body or human remains, whether buried or not,

is guilty of a crime and liable to imprisonment for [two years].

2. Against Bodily Integrity

- Battery 7.10 - Everyone who makes [offensive] physical contact with another against his will, is guilty of [the misdemeanor of] battery. (W.P. Assault).
- Assault 7.11 - Everyone who by act or gesture threatens immediate physical violence to another, is guilty of [the misdemeanor of] assault. (W.P. Assault).
- Bodily Harm 7.12 - Everyone who causes bodily harm to another is guilty of [the misdemeanor of] causing bodily harm. (W.P. Assault).
- Aggravated
Offences 7.13 - Everyone who commits an offence under subsections 10, 11 or 12 of this section
- (a) while armed;
 - (b) with intent to cause serious bodily harm, commit a serious offence or escape arrest or detention;
 - (c) if the victim is a peace officer or other person acting for the purposes of law enforcement; or
 - (d) if as a result the victim suffers serious bodily harm:
- is guilty of [aggravated] battery, assault or bodily harm, as the case may be, and is liable to imprisonment for [five years]. (W.P. Assault).

NOTES

Saving for
Medical
Treatment

7.14 - [NOT DRAFTED]

Saving for
Contact
Sports

7.15 - No offence under this section is committed on a willing victim when the harm is inflicted in the course of a sport, game or other activity of acceptable social value.

3. Against Sexual Integrity

Sexual
Interference

7.16 - Everyone who for a sexual purpose touches another without his consent is guilty of [the misdemeanor of] sexual interference. (R. 10).

Sexual
Aggression

7.17 - Everyone who uses or threatens violence in the course or for the purpose of sexual interference is guilty of [the crime of] sexual aggression and liable to imprisonment for [five years]. (R. 10).

Sexual
Interference
with
Persons under
Fourteen

7.18 - Everyone who for a sexual purpose touches a person under fourteen with or without his consent is guilty of [a crime] and liable to imprisonment for [two years]. (R. 10).

Sexual
Interference
with
Dependents

7.19 - Everyone who for a sexual purpose touches a person of fourteen years of age or older but under eighteen years of age, whose consent was obtained by the exercise of authority or by the exploitation of dependency, is guilty of [a crime] and liable to imprisonment for [two years]. (R. 10).

NOTES

4. Against Liberty

- Intimidation 7.20 - Everyone who for any purpose threatens violence to the person, family or property of another is guilty of [a crime] and punishable with imprisonment for [two years].
- Frightening 7.21 - Everyone who persistently follows, harasses, or frightens another or besets or watches his dwelling-house or place of work is guilty of [a crime] and punishable with imprisonment for [one year].
- False Imprisonment 7.22 - Everyone who confines, imprisons or forcibly seizes another against his will is guilty of [a crime] and punishable by imprisonment for [five years].
- Abduction 7.23 - Everyone who takes or causes to be taken an unmarried person under the age of sixteen out of the possession of and against the will of a parent or other person having lawful care, charge or custody of that unmarried person is guilty of [a crime] and liable to imprisonment for [five years].

5. Against Safety

- Endangering 7.24 - Everyone who exposes another or the public to a serious and unjustifiable risk of harm or injury is guilty of [a crime] and punishable by imprisonment for [two years].
- [The offence of causing bodily harm defined in s.7.12 can be committed intentionally or recklessly, for since no mens rea is specified, knowledge is the only requirement. This being so, no special provision is required for causing bodily harm by recklessness or "criminal negligence". Nor, in view of our tradition on mens rea, is there any provision for causing bodily harm by mere negligence.]

NOTES

- Nuisance 7.25 - Everyone who unjustifiably obstructs, inconveniences or causes damage or danger to the public in its exercise of its lawful rights is guilty of [a crime] and liable to imprisonment for [one year].
- Explosives etc. 7.26 - Everyone who commits an offence under s.7.24 or 7.25 through use or possession of explosives or other dangerous substances is guilty of {a crime} and liable to imprisonment for [five years].
- Motor Vehicles etc. 7.27 - Everyone who dangerously drives a motor vehicle, vessel or aircraft in a public place is guilty of [a crime] and liable to imprisonment for [two years].
- Rescue 7.28 - Everyone who impedes the rescue of a person in danger is guilty of [a crime] and liable to imprisonment for [two years].
- Impaired Driving 7.29 - [NOT DRAFTED]

6. Against Privacy

- Definitions 7.30 - (1) In this sub-part "dwelling-place" means any dwelling-house, building or other shelter used or adapted for overnight accommodation.
- Electromagnetic Device (2) In this sub-part "electromagnetic, acoustical, mechanical or other device" means any device used or capable of being used to intercept a private communication or to make stealthy observations but does not include a hearing aid used to correct the user's hearing to aid better than normal or spectacles used to correct the user's vision to not better than normal.
- Official Authorization (3) For the purpose of s.7.35 official authorization is authorization given according to the regulations prescribed in Schedule A of this Code.

NOTES

- Intrusion into Dwelling-house 7.31 - Everyone who intrudes into another's dwelling-place without the occupier's consent or remains therein against the occupier's will is guilty of [misdemeanor].
- Intrusion by Night on Other Property 7.32 - Everyone who intrudes by night onto another's property near a dwelling-place on such property is guilty of [misdemeanor].
- Break and Enter 7.33 - Everyone who intrudes into any building or structure used in the ordinary course of business, or remains therein against the owner's or occupier's will, meaning to commit a criminal offence therein, is guilty of [a crime] and liable to imprisonment for [two years].
- Burglary 7.34 - Everyone who intrudes into another's dwelling-place without the occupier's consent or remains therein against the occupier's will, meaning to commit a criminal offence therein, is guilty of [a crime] and liable to imprisonment for [five years]. (R. 12).
- Invasion of Privacy 7.35 - Everyone who without official authorization by using an electromagnetic, acoustical, mechanical or other device intercepts a private communication or makes stealthy observations of another is guilty of [a crime] and liable to imprisonment for [one year].

PART VIII - OFFENCES AGAINST PROPERTY

- Definitions 8.01 - For the purposes of Part II property is another's if he owns it, has possession, control or custody of it or has any legally protected interest in it. (R. 12).

NOTES

1. Destruction and Damage

- Vandalism 8.02 - (1) Everyone who damages another's tangible property without his consent or by physical interference renders it useless or inoperative, subject to subsection (2) of this section, is guilty of [the crime of] vandalism and liable to imprisonment for [two years].
- (2) Everyone who commits vandalism where the loss resulting from such vandalism does not exceed \$500.00, is guilty of [misdemeanor].

- Arson 8.03 - [NOT DRAFTED]

2. Dishonest Appropriation

- Theft 8.04 - (1) Everyone commits theft who dishonestly appropriates another's property without his consent.
- Appropriation by Violence etc. (2) For the purposes of this subsection, appropriation by violence or threat of immediate violence is appropriation without consent. (R. 12).
- Appropriating (3) "Appropriating property" means
- (a) taking, with intent to treat as one's own, tangible movables including immovables made movable by the taking;
 - (b) converting property of any kind by acting inconsistently with the express or implied terms on which it is held; or
 - (c) using electricity, gas, water, telephone, telecommunication or computer services, or other utilities. (R. 12).
- Sanction (4) [NOT DRAFTED]

NOTES

- Dishonest Taking 8.05 - (1) Everyone commits dishonest taking who dishonestly and without consent takes another's property though without intent to permanently deprive. (R. 12).
- Sanction (2) [NOT DRAFTED]
- Robbery 8.06 - (1) Everyone commits robbery who for the purposes of theft uses violence or threats of immediate violence to person or property. (R. 12).
- Sanction (2) [NOT DRAFTED]
- Blackmail 8.07 - (1) Everyone commits blackmail who threatens another with injury to person, property or reputation in order to extort money, property or other economic advantage. (R. 12).
- Sanction (2) [NOT DRAFTED]
- Fraud 8.08 - (1) Everyone commits fraud who dishonestly by
- (a) deceit, or
 - (b) unfair non-disclosure, or
 - (c) unfair exploitation,
- either induces any person including the public to part with any property or causes him to suffer a financial loss.
- Deceit (2) For the purpose of this subsection "deceit" means any false representation as to the past, present or future.
- Puffing (3) Deceit does not include mere exaggerated commendation or depreciation of the quality of anything.

NOTES

- Non-disclosure (4) For the purpose of this subsection non-disclosure is unfair where a duty to disclose arises from
- (a) a special relationship entitling the victim to rely on the offender, or
 - (b) conduct by the offender creating a false impression in the victim's mind, or
 - (c) circumstances where non-disclosure would create a false impression in the mind of any reasonable person.
- Unfair Exploitation (5) For the purpose of this subsection "unfair exploitation" means exploitation
- (a) of another person's mental deficiency;
 - (b) of another person's mistake intentionally or recklessly induced by the offender;
 - (c) of another person's mistake induced by the unlawful conduct of a third party acting with the offender.
- (6) Parting with Property
- "Parting with Property" means relinquishing ownership, possession, control or other interest in it. (R. 12).
- Sanction (7) [NOT DRAFTED]
- Dishonest Obtaining 8.09 - (1) Everyone commits dishonest obtaining if he dishonestly obtains food, lodging, transport or services without paying. (R. 12).
- Sanction (2) [NOT DRAFTED]

NOTES

3. Related Offences

Unlawful Possession 8.10 - (1) Everyone who has in his possession any property which he knows was obtained or derived from conduct constituting in Canada a crime is guilty of [a crime] and liable to imprisonment for [two years].

Sanction (2) [NOT DRAFTED]

Forgery 8.11 - (1) Everyone who dishonestly makes or utters a false document meaning it to be acted on as genuine is guilty of [the crime of] forgery and liable to imprisonment for [two years].

(2) A document is false within the meaning of subsection (1) when it tells a lie about itself.

[Special forgeries, e.g. of dollar bills, will be dealt with under offences against social institutions.]

Sanction (3) [NOT DRAFTED]

NOTES

PART IX - OFFENCES AGAINST THE ENVIRONMENT

[This would be a new heading in the Code, but one whose time in our opinion has now come. At this time we are not in a position to delineate its contents with precision, particularly since it is at present being studied by another project. Tentatively we suggest that the topic might be divided along the following lines:

- . Offences involving destruction
- . Offences involving damage (pollution)
- . Offences involving waste
- . Offences against "quiet enjoyment" (e.g. noise)
- . Offences against animals (as res in rerum natura)

Two caveats:

- (1) The above headings are merely tentative - pegs for the Protection of Life Project to use as they see fit and as they find helpful.
- (2) This listing is not meant to commit the new Code necessarily to the inclusion of any of the above offences.]

PART X - OFFENCES AGAINST SOCIETY

1. Against Peace

Definitions

10.01 - [NOT DRAFTED]

Unlawful
Assembly

10.02 - Every member of an assembly of three or more persons so conducting themselves as to cause reasonable apprehension of breach of the peace is guilty of [misdemeanor].

NOTES

- Riot 10.03 - Every member of an assembly of three or more persons simultaneously disturbing the peace is guilty of [a crime] and liable to imprisonment for [one year].
- Aggravated Riot 10.04 - Everyone who being a member of an assembly of twelve or more persons simultaneously disturbing the peace, does not peaceably disperse and depart on the making of a riot proclamation as provided by subsection 05 of this section or who obstructs the lawful making of such proclamation is guilty of [a crime] and liable to imprisonment for [two years].
- Riot Proclamation 10.05 - A justice, mayor or sheriff or the lawful deputy of a mayor or sheriff who receives notice that, at any place within his jurisdiction, twelve or more persons are unlawfully and riotously assembled together, shall go to that place and, after approaching as near as safely he may do, if he is satisfied that a riot is in progress, shall command silence and thereupon make or cause to be made in a loud voice a proclamation in the following words or to the like effect:
- Her Majesty the Queen charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business upon the pain of being guilty of an offence for which, upon conviction, they may be sentenced to imprisonment for life. GOD SAVE THE QUEEN.
- Duelling 10.06 - Everyone who engages in a duel is guilty of [a crime] and liable to imprisonment for [one year].
- Prize Fight 10.07 - Everyone who engages in or assists at a prize fight is guilty of [misdemeanor].

NOTES

- Forcible Entry and Detainer 10.08 - Everyone who enters a building or land in another's peaceable possession, or, being in possession of such building or land without colour of right, detains it, in a manner likely to cause a breach of the peace is guilty of [misdemeanor].
- Offensive Weapons 10.09 - [NOT DRAFTED]
- [Questions to be addressed:
- (1) What sort of weapons? - obviously firearms, flick-knives;
 - (2) What sort of offences? - obviously going armed with them, and possessing them?
 - (3) Permits and registration? - to go in a schedule]
- Disorderly Behaviour 10.10 - Everyone who causes a disturbance in or near a public place by fighting, shouting, using obscene language, being drunk, molesting others or discharging firearms, is guilty of [misdemeanor].
- Public Mischief 10.11 - Everyone who misleads a peace officer by falsely reporting a death or the commission of an offence is guilty of an [misdemeanor].
- Spreading False News 10.12 - Everyone who publishes news which he knows to be false and likely to cause injury or mischief to a public interest is guilty of [misdemeanor].
- Hate Propaganda 10.13 - (1) Everyone who advocates or promotes the destruction of a group distinguished by colour, race, religion or ethnic origin is guilty of [a crime] and liable to imprisonment for [five years].
- (2) Everyone who publicly incites hatred against a group as defined by paragraph (1) is guilty of [misdemeanor].

NOTES

2. Against Justice

Misleading
Justice

- 10.14 - (1) Everyone who, being a witness in a judicial proceeding or being authorized by law to make a statement by affidavit or orally on oath, gives false evidence meaning to mislead, is guilty of [the crime of perjury] and liable to imprisonment for [two years]
- (2) Everyone who fabricates anything meaning it to be used as evidence in a judicial proceeding and meaning to mislead is guilty of [a crime] and liable to imprisonment for [two years].

Defeating
Justice

- 10.15 - Everyone who obstructs, perverts or defeats the course of justice in a judicial proceeding is guilty of [a crime] and liable to imprisonment for [two years].

Corrupting
Justice

- 10.16 - Everyone who offers a bribe to a judge, officer of the court, juror or witness, in relation to a judicial proceeding, is guilty of [a crime] and liable to imprisonment for [two years].

3. Against Social Institutions

(A) Against Marriage and the Family

Bigamy

- 10.17 - Everyone who being married goes through a form of marriage with another person is guilty of [the crime of] bigamy and liable to imprisonment for [one year].

[Nothing being said on mens rea, the minimum mental requirement is knowledge. Do we really need a seven years' absence provision? Is it really evidence of lack of knowledge that you are still married?]

NOTES

Unlawful
Solemnization
of Marriage

10.18 - Everyone who solemnizes or pretends to solemnize a marriage without lawful authority or in violation of the laws of the province where the marriage is solemnized is guilty of [misdemeanor].

- [N.B.
1. Abduction (see s.7.23) should perhaps be under this rubric rather than under Part I (4).
 2. Offences relating to registers of marriage etc. should come under a special heading under Part IV.
 3. Communicating venereal disease (Cr.C. s.253) is surely covered by causing Bodily Harm.
 4. Procuring Feigned Marriage (Cr.C. s.256) - is this necessary?
 5. Polygamy - if there are marriages, then it can be caught by bigamy; if there are not, then it should be no offence any more than is fornication or adultery.]

(B) Against Records etc.

Against
Registers

10.19 - Everyone who dishonestly destroys, damages or alters a register or other document required or authorized by law to be kept or a copy thereof is guilty of [a crime] and liable to imprisonment for [one year].

False Copies
of Registers

10.20 - Everyone who dishonestly issues a false certified copy of a register or other document required or authorized by law is guilty of [a crime] and liable to imprisonment for [one year].

Other
Documents

10.21 - Everyone who dishonestly destroys, damages or alters a document of title, a valuable security, a testamentary instrument, a judicial document or an official document, is guilty of [a crime] and liable to imprisonment for [one year].

NOTES

- Other
Data Banks
- 10.22 - Everyone who dishonestly destroys, damages or alters a data bank of information held in the ordinary course of business is guilty of [a crime] and liable to imprisonment for [one year].
- (C) Against Credit
- Against
Currency
- 10.23 - (1) Everyone who dishonestly makes or utters counterfeit Canadian banknotes or coins is guilty of [a crime] and liable to imprisonment for [one year].
- (2) Everyone who dishonestly possesses counterfeit Canadian banknotes or coins or instruments for their counterfeiting is guilty of [misdemeanor].
- Against
Banking
- 10.24 - (1) Everyone who dishonestly misleads a bank as to the state of an account with that bank is guilty of [a crime] and liable to imprisonment for [one year].
- (2) Everyone who dishonestly causes a bank to pay money into or out of an account with that bank is guilty of [a crime] and liable to imprisonment for [one year].
- Against
Credit Cards
- 10.25 - Everyone who dishonestly uses any credit card is guilty of [a crime] and liable to imprisonment for [one year].
- Against
Stock Market
- 10.26 - [Fraudulent trading, rigging the market, wash trading etc. - to be worked out later].

NOTES

(D) Against Communications

- Against
the Mail
- 10.27 - Everyone who intercepts or otherwise interferes with the mail is guilty of [a crime] and liable to imprisonment for [one year].
- Against
Radio and TV
- 10.28 - Everyone who interferes with any radio or television station or transmission is guilty of [a crime] and liable to imprisonment for [one year].
- Against
the Telephone
- 10.29 - (1) Everyone who intercepts or interferes with any telephone system or communication is guilty of [a crime] and liable to imprisonment for [one year].
- (2) Everyone who makes indecent, harassing or threatening telephone calls is guilty of [misdemeanor].
- Against
Transport
- 10.30 - (1) Everyone who does anything likely to endanger any land, sea or air transport facility is guilty of [a crime] and liable to imprisonment for [five years].
- (2) Everyone who obstructs any such transport facility is guilty of [a crime] and liable to imprisonment for [one year].
- (3) Everyone who defrauds the operators of any omnibus, rail, ship or aircraft of the legal fare is guilty of [a crime] and liable to imprisonment for [one year].

4. Against Public Morality

(A) Against Decency

- Gross
Indecency
in Public
- 10.31 - Everyone who commits an act of gross indecency in a public place is guilty of [misdemeanor].

NOTES

Indecent
Exhibition 10.32 - Everyone who exhibits any indecent article or exhibition in a public place is guilty of [misdemeanor].

[This would also cover exhibiting obscene articles or exhibitions. Here the indecency is the gist of the offence.]

Nudity 10.33 - Everyone who is nude in a public place or is nude while exposed to public view is guilty of [misdemeanor].

Sacrilege 10.34 - Everyone who desecrates any place ordinarily used for divine services or other religious practices or who disturbs the holding of such services or practices is guilty of [the crime of] sacrilege and liable to imprisonment for [one year].

Soliciting 10.35 - [NOT DRAFTED]

(B) Against Social Values

Obscene
Exploitation 10.36 - Everyone who for the purpose of obscenity exploits a person under eighteen years of age or exposes such a person to obscenity is guilty of [a crime] and liable to imprisonment for [one year].

Prostitution
Exploitation 10.37 - Everyone who exploits another for the purposes of prostitution is guilty of [a crime] and liable to imprisonment for [one year].

Gambling etc. 10.38 - [NOT DRAFTED]

NOTES

- Drugs etc. 10.39 - (1) Everyone who is in possession of a drug listed in Schedule _____ is guilty of [a crime] and liable to imprisonment for [one year].
- (2) Everyone who commits what would, but for his intoxication by alcohol or other drugs (whether or not listed in Schedule _____), constitute an offence is guilty, unless he proves that his intoxication was due to fraud, duress, physical compulsion or reasonable mistake, of [the crime of] criminal intoxication and liable to the same punishment as that for the [offence] which he would otherwise have committed.
- (3) Everyone who trafficks in a drug listed in Schedule _____ is guilty of [a crime] and liable to imprisonment for [five years].

PART XI - OFFENCES AGAINST THE STATE

1. Against Internal Security

Definitions

11.01 - [NOT DRAFTED]

Treason
Against the
Majesty

- 11.02 - (1) Everyone who kills or attempts to kill Her Majesty or does her any bodily harm or imprisons or restrains her is guilty of [the crime of] treason against Her Majesty and liable to imprisonment for life.
- (2) Everyone who in the presence of Her Majesty attempts to cause bodily harm to Her Majesty or does an act meant to alarm Her Majesty or break the peace, is guilty of [a crime] and liable to imprisonment for [fourteen years].

Treason
Against
Canada

11.03 - Everyone who uses violence to overthrow the government of Canada or a province is guilty of [the crime of] treason against Canada and liable to imprisonment for life.

NOTES

Sabotage 11.04 - [NOT DRAFTED]

Official
Secrets
Offences (1) 11.05 - [NOT DRAFTED]

[It would cover revealing confidential information to the detriment of Canada's internal security.]

2. Against External Security

Espionage 11.06 - [NOT DRAFTED]

Official
Secrets
Offences (2) 11.07 - [NOT DRAFTED]

[It would cover revealing secrets to foreign powers or enemies to the detriment of Canadian security.]

Assisting
Enemies 11.08 - Everyone who assists an enemy of Canada is guilty of [a crime] and liable to imprisonment for life.

Levying War
Against
Canada 11.09 - Everyone who levies war against Canada is guilty of [a crime] and liable to imprisonment for life.

3. Concerning Citizenship

Illegal Entry 11.10 - Everyone who enters Canada without official permission express or implied is guilty of [misdemeanor].

NOTES

Passport Offences 11.11 - Everyone who dishonestly obtains or uses a passport to which he is not entitled is guilty of [misdemeanor].

[Offences relating to forging passports will be covered by forgery.]

Citizenship Certificate 11.12 - Everyone who dishonestly obtains or uses a citizenship certificate to which he is not entitled is guilty of [misdemeanor].

4. Against State Institutions

Intimidation Against Parliament or Legislatures 11.13 - Everyone who intimidates Parliament or a legislature is guilty of [a crime] and liable to imprisonment for life.

Disobeying a Statute 11.14 - [NOT DRAFTED]

Against Courts - Contempt 11.15 - Everyone who disrupts judicial proceedings, defies judicial authority, affronts judicial authority or obstructs or interferes with judicial proceedings is guilty of [the crime of] contempt of court and liable to imprisonment for [two years].

[See report 17 pp 44 ff - the description of the offence is based on the marginal notes in that Report].

Escape 11.16 - (1) Everyone who escapes from lawful custody or is unlawfully at large is guilty of [a crime] and liable to imprisonment for [one year].

[Rescue, assisting and permitting escape could all be covered by aiding and abetting. Non-attendance to a summons or subpoena needs no separate offence - it is covered, if need be, under defying judicial authority (s.11.15 above)].

NOTES

Offences
Concerning
Police etc.

- 11.17 - (1) Everyone who incites a peace officer or member of the armed forces to mutiny or disaffection is guilty of [a crime] and liable to imprisonment for [five years].
- (2) Everyone who impersonates a peace officer etc. is guilty of [a crime] and liable to imprisonment for [five years].
- (3) Everyone who bribes or otherwise corrupts a peace officer is guilty of [a crime] and liable to imprisonment for [five years].
- (4) Every peace officer who mutinies or accepts a bribe is guilty of [a crime] and liable to imprisonment for [five years].

Against
Revenue

- 11.18 - Everyone who dishonestly evades payment of any tax authorized by law is guilty of [a crime] and liable to imprisonment for [two years].

[This covers income tax fraud, smuggling and fraudulent evasion of excise or sales taxes.]

Against
Public Stores

- 11.19 - Everyone who destroys, damages or steals from public stores is guilty of [a crime] and liable to imprisonment for [two years].

Against
Boundaries

- 11.20 - Everyone who destroys, damages, alters or removes a boundary mark authorized by law ... is guilty of [a crime] and liable to imprisonment for [two years].

NOTES

PART XII - OFFENCES AGAINST INTERNATIONAL LAW

[NOT DRAFTED]

This Part would include:

Piracy
Hijacking
Offences against Protected Persons
Foreign Enlistment
War Crimes
Genocide

NOTES

Endnotes

1. Work has also proceeded on criminal procedure evidence and sentencing, which topics are outside the terms of reference of the memo.
2. Whether there should be a separate code on procedure or whether there should be one combined code of substance and procedure has not yet been settled. This memo, however, concerns only the substantive aspects of Criminal Law.
3. Except for (a) technical offences under Special Acts like the Bankruptcy Act, (b) regulatory offences and (c) drug offences.
4. Except for the anomalous offence of contempt of court which is presently under consideration for reform.

NOTES